United Mine Workers of America, District 5, and its Local 1378, AFL–CIO (Pennsylvania Mines Corporation) *and* Elwood Selapack. Case 6–CB–8906

May 30, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On February 14, 1994, Administrative Law Judge Bernard Ries issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondents, United Mine Workers of America, District 5, and its Local 1378, AFL–CIO, did not, as alleged, violate Section 8(b)(1)(A) of the Act by retaining the proceeds of an arbitration award in Local 1378's treasury rather than distributing these funds to unit employees. While noting that it ''may have been shortsighted on the [Respondents'] part'' to let the Local keep the money, the judge concluded that ''it scarcely makes the decision to turn the funds over to the Union treasury 'irrational.''' (Footnote omitted.) For the reasons stated below, we reverse the judge and find that the Respondents' conduct in failing and refusing to distribute the moneys awarded was arbitrary and unreasonable and in violation of Section 8(b)(1)(A) of the Act.

The evidence shows that Respondent Local 1378 represented employees at the Employer's Tunnelton mine in Indiana County, Pennsylvania. In June 1992,[1] the Employer laid off approximately 140 employees pending the sale of the Tunnelton mine, leaving only 1 unit employee on the job. On July 7, the Union filed a grievance alleging that the Employer's supervisors had been performing unit work and seeking a make whole remedy. The grievance went to arbitration on September 9.[2] Following a hearing, the arbitrator issued his decision on November 30, directing that the Employer pay ''mine inspector, lampman, and mechanic for all hours they would have worked during period mine was idled.'' The arbitrator did not specify the individuals who were entitled to backpay, but rather, ''[p]ursuant to a stipulation of the parties,'' he retained jurisdiction over ''the calculation of backpay and identification of the proper individuals to receive pay'' if either party so requested in writing within 60 days.

In early December, Kenneth Horcicak, an executive board member for District 5, sent the Employer a letter in which he requested that the Employer pay the arbitration award of $6121.09 directly to Local 1378. The Employer then mailed the Respondents a check for the proper amount which Respondent Local deposited in its account based on advice given to Respondent District by Mine Workers International. The Respondents did not disburse any of these funds to the unit employees.

During Respondent Local's monthly meeting in January 1993, Charging Party Selapack complained about Respondent Local's failure to distribute the money to the unit employees. Respondent Local's officials rejected Selapack's argument on the ground that ''it would be too difficult to figure out who would get the money.'' Selapack subsequently filed the instant charge on February 24, 1993.

In *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), the Board held that Section 8(b)(1)(A) of the Act ''prohibits labor organizations, when acting in a statutory capacity, from taking [union] action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.'' Thus, the duty of fair representation gives employees the right under Section 7 to be represented without arbitrary, irrelevant, or invidious discrimination by their exclusive bargaining representative.[3] A labor organization's arbitrary conduct alone may be sufficient to constitute a violation of its duty of fair representation.[4] Even without any hostile motive of discrimination and in complete good faith, a labor organization may pursue a course of action that is so unreasonable and arbitrary as to constitute a breach of its duty of fair representation. In evaluating, however, whether such conduct is so arbitrary as to breach this duty of fair representation, unions have been afforded a ''wide range of reasonableness'' so long as they exercise their discretion in good faith.[5]

[1] All dates are in 1992 unless otherwise noted.

[2] Local 1378, fearing that the arbitrator would find that its own grievance was untimely, had Charging Party Elwood Selapack file another grievance, on August 28, raising the same issue as a precaution against such a finding. The logic behind Respondent Local's thinking on the timeliness issue is unknown. In any event, the arbitrator considered the initial grievance on the merits and the parties settled Selapack's grievance when the Employer paid the award which the arbitrator had provided.

[3] The Supreme Court, while approvingly citing *Miranda*, supra, stated in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), that a union's duty of fair representation ''includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.''

[4] *NLRB v. American Postal Workers (Postal Service)*, 618 F.2d 1249 (8th Cir. 1980).

[5] *Ford Motor Co v. Huffman*, 345 U.S. 330, 338 (1953).

Applying these principles to the present case, we find that the Respondents breached their duty of fair representation owed to the unit employees by their conduct here. We note that the Respondents initiated the grievance contesting the use of supervisors to perform certain unit work and then solicited a grievance from Charging Party Selapack alleging the same contractual violations. The Respondents, by filing these grievances, were effectively arguing that, if the Employer had honored the terms of the collective-bargaining agreement, the Employer would have recalled additional employees to perform the work which supervisors had done. Yet, after prevailing on their own grievance in arbitration, the Respondents chose to retain the moneys awarded by the arbitrator in Respondent Local's general treasury rather than distribute the money to unit employees in a manner consistent with the arbitrator's award.

We find that where, as here, a union pursues a grievance on behalf of unit employees and receives funds either through settlement or an arbitration award to be paid to these employees, the union usually has an obligation to distribute such funds to unit employees. In so concluding, we stress that the arbitrator's award was quite clear in directing the Employer to pay employees in three particular job classifications who might have been called to work if the Employer had not breached the collective-bargaining agreement. Thus, this is not a case in which the arbitrator's award was ambiguous so that the Union could exercise some discretion in the final resolution of the grievance.[6] It also is not a situation in which there were clear possibilities of loss on one category of claim that would have warranted settling for an amount based on the other provable claim.[7] Here, the Respondents circumvented the arbitrator's award by claiming the proceeds for Respondent Local's treasury and thus acted in derogation of their duty of fair representation by acting arbitrarily and unreasonably. We, therefore, conclude that, by failing to distribute the moneys that the Employer paid them, the Respondents violated Section 8(b)(1)(A) of the Act.

Based on testimony by Respondent District 5's executive board member, Kenneth Horcicak, the Respondents have argued that division of the arbitration award would have been completely ''speculative'' in that ''it would have been impossible to say during that time period who would and who would not have accepted recall, because there was no obligation for them to do so.'' We reject the Respondents' premise here that such uncertainty in being able to identify with precision the individuals affected by the Employer's conduct afforded the Respondents an opportunity to appropriate these moneys to its general fund.[8] In finding no merit to this argument, we emphasize that the Respondents have identified no risks of reduction of the total recovery that might have resulted from their attempting to identify the specific employees who had lost wages by virtue of the contract breach. Furthermore, although some degree of informed speculation may have been required in order to determine proper beneficiaries of the arbitrator's award, the Respondents certainly knew which employees were working immediately before the layoffs in those job classifications involved in the arbitration. The Respondents also knew, by the time the arbitration award issued, which of the affected employees had accepted recall to those classifications when the new owner, having purchased the site from the Employer, reopened the mine in September 1992. Thus, the Respondents had available to them criteria to assist them in determining those unit employees who should have received the proceeds of the arbitrator's award.

Moreover, the Respondents could have more generally distributed the funds among the unit employees, exercising their discretion in a manner free of ''hostile, invidious, irrelevant, or unfair considerations.'' See *Steelworkers Local 2869 (Kaiser Steel Corp.)*, 239 NLRB 982 (1978). As the Board implicitly held in *Teamsters Local 101 (Allied Signal Corp.)*, 308 NLRB 140 (1992), a union has wide latitude in determining the manner in which to distribute the proceeds of a favorable arbitration award. Here, if the Respondents, as claimed, had legitimately feared offending those unit members who would not have been recipients of the award proceeds,[9] the Respondents could have resubmitted the matter to the arbitrator who had retained jurisdiction over the matter to resolve precisely this issue on request of either party.[10] Yet, the Respondents manifestly avoided all reasonable means for distributing the proceeds among unit employees and, instead, acted unreasonably by depositing the funds in Respondent Local's treasury. This interfered with the unit

[6] See *Cleveland v. Porco Co.*, 38 F.3d 289 (7th Cir. 1994).

[7] *Nida v. Plant Protection Assn.*, 7 F.3d 522 (6th Cir. 1993).

[8] To the extent that grievances often involve claims of losses to unspecified employees, it is important that unions not be tempted to pursue these grievances as a source of revenue, as would be the case were we to allow the appropriation of backpay awards to general union funds.

[9] The Respondents' assertion of this defense highlights the arbitrariness of the Respondents' actions. The persons whom the Respondents purportedly now seek not to offend were the Employer's laid-off employees in three identified classifications, each of whom might be able to claim some basis for receiving a portion of the arbitrator's monetary award. The Respondents' treatment of those employees resulted in *no* employee receiving any portion of the monetary award, while the Respondents, which have never claimed an injury entitling it to any portion of the monetary award, now retains the entire proceeds of the award.

[10] Although the judge speculated that any further proceeding before the arbitrator would have diminished the arbitration award proceeds, there is no record evidence to support this conclusion and the Respondents themselves never raised this argument.

employees' Section 7 rights. For these reasons, we find that the Respondents have not raised a valid defense in their claim that they kept the proceeds of the arbitration award because they could not determine which unit employees should receive them.

We, therefore, conclude that the Respondents violated Section 8(b)(1)(A) by failing and refusing to distribute the funds the arbitrator awarded. Although a union normally can exercise wide discretion in the handling of grievances filed under the collective-bargaining agreement, we find that the Respondents crossed the line of rationality and acted to the detriment of unit members for reasons that are so arbitrary as to breach their duty of fair representation to the affected unit employees.

CONCLUSIONS OF LAW

1. Respondent Unions, United Mine Workers of America, District 5, and its Local 1378, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

2. Pennsylvania Mines Corporation is an employer within the meaning of Section 2(2) of the Act and at all times material here has been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By failing and refusing to distribute the proceeds of the arbitration award resulting from its grievance over supervisors performing unit work to the unit employees, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. The Respondents' unfair labor practices affect commence within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have violated Section 8(b)(1)(A) of the Act, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall also order that the Respondents make whole the unit employees, with interest, for any losses they suffered by reason of the Respondents' failure and refusal to distribute the proceeds of the arbitration award that resulted from their grievance over the Employer's use of supervisors to perform unit work while the employees were on layoff status, in a manner consistent with this decision.[11] Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[11] The General Counsel does not request that this case be resubmitted to the arbitrator for this determination and we shall not order it, particularly given the passage of time since the arbitrator's decision issued.

ORDER

The National Labor Relations Board orders that the Respondents, United Mine Workers of America, District 5, and its Local 1378, AFL–CIO, Indiana County, Pennsylvania, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to distribute the proceeds of the arbitration award resulting from their grievance over supervisors performing unit work to the unit employees.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole unit employees, with interest, for any losses they suffered by reason of the Respondents' failure and refusal to distribute the proceeds of the arbitration award that resulted from their grievance over the Employer's use of supervisors to perform unit work while the unit employees were on layoff status, in the manner set forth in the remedy.

(b) Post at their business offices and all other places where notices to members are posted copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER TRUESDALE, dissenting.

Contrary to my colleagues, I would not find that the Respondents violated Section 8(b)(1)(A) of the Act by retaining the proceeds of the arbitration award in Local 1378's general treasury. Thus, I agree with the judge that the Respondents' decision was within the wide range of discretion afforded to unions by the Supreme Court in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

The facts here show that during June 1992 the Employer laid off all but one unit employee from its Marion Mine #33 and then used statutory supervisors to perform unit work. On learning that the Employer had

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

breached their collective-bargaining agreement, the Respondents filed a grievance which was pursued to arbitration. The arbitrator found for the Respondents and awarded them $6,121.09. Pursuant to agreement with the Employer, the Employer paid the Respondents the amounts owed. The Respondents deposited the sums in Local 1378's treasury rather than attempting to identify the unit employees who were adversely affected by the Employer's contractual breach.

A union has an obligation under the Act to represent fairly all the employees in the bargaining unit, and that obligation extends to the union's actions in the handling of grievances.[1] As the Supreme Court emphasized, however, in *Ford Motor Co. v. Huffman*, supra, ''[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.'' Thus, the Board has held that ''it is not every act of disparate treatment or negligent conduct which is proscribed by Section 8(b)(1)(A), but only those which, because motivated by hostile, invidious, irrelevant, or unfair considerations, may be characterized as 'arbitrary conduct.' [Footnotes omitted.]''[2] Although a union's duty to the unit employees is not fulfilled by mere arbitrary action, the Board has held that it is not breached by tactical considerations or mere negligent action or nonaction.[3] The Board also does not require that ''every possible option be exercised'' or that a grievance be handled ''in a perfect manner.''[4]

In explaining their failure to distribute the proceeds of the arbitration award, the Respondents stated that they could perceive no objective basis for identifying the proper recipients. There were several factors present here, as the Respondents pointed out at the hearing, that would have complicated any attempt to make this determination. Because any recalls the Employer made following the June 1992 layoffs were likely to be for temporary jobs, the Respondents and the Employer agreed to waive the contractual provision that employees who declined recall offers would lose their position on the recall list. The Respondents argued that in this situation, where employees had no obligation to accept recall, they could not determine which employees would have returned to work if the Employer had complied with the contract and used unit employees, instead of supervisors, to perform the work. Furthermore, under the Respondents' collective-bargaining agreement, employees on layoff status from other mines that the Employer operated also had recall rights to Marion Mine #33. For these reasons, the Respondents concluded, as their mine chairman stated, that ''it would be too difficult to figure out who would get the money.''

The evidence shows that the Respondents vigorously pursued the grievance they filed and won it. Since it was impossible to determine precisely which employees suffered losses in pay or the amount of such losses, the Respondents made an administrative decision to retain the funds awarded them. While the judgment that the Respondents exercised may not meet the optimal standards of competence and diligence that the Board would like to see observed by unions acting as exclusive bargaining representatives, I would not find that this decision violated the Act. As stated, a breach of the duty of fair representation occurs only when the union's conduct is ''arbitrary, discriminatory, or in bad faith.''[5] Even my colleagues do not contend that the choice the Respondents made in keeping the moneys was motivated by hostile or unfair considerations. As to the issue of arbitrariness, I conclude that the Respondents acted in good faith and that, as the judge noted,'' While [the disposition of the award] may have been shortsighted on the part of Respondent, it scarcely makes the decision to turn the funds over to the Union treasury 'irrational.''' Therefore, I would not find that the conduct of the Respondents in this case breached their duty of fair representation in violation of Section 8(b)(1)(A).[6] Unions are afforded ''a wide range of reasonableness'' in serving the unit employees under *Huffman*, supra, and only those actions deemed to be so far outside that ''wide range of reasonableness'' can be deemed ''irrational'' and hence arbitrary under *Air Line Pilots Assn. International v. O'Neill*, 499 U.S. 65, 67 (1991).[7] Measured against that standard, the Respondents' actions cannot be considered to have violated their duty of fair representation. Accordingly, I would dismiss the instant complaint.

[1] *Teamsters Local 860 (The Emporium)*, 236 NLRB 844 fn. 2 (1978).

[2] *Steelworkers Local 2869 (Kaiser Steel Corp.)*, 239 NLRB 982 (1978).

[3] See *Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446, 447–448 (1974).

[4] *Teamsters Local 355 (Monarch Institutional Foods)*, 229 NLRB 1319, 1321 (1977).

[5] *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

[6] See *Steelworkers Local 2869 (Kaiser Steel Corp.)*, supra at fn. 2.

[7] See *Teamsters Local 101 (Allied Signal Corp.)*, 308 NLRB 140 (1992), where the Board found that the union had not acted arbitrarily by distributing a portion of the arbitration proceeds to a classification of employees who were not the subject of the underlying grievance.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to distribute the proceeds of the arbitration award resulting from our grievance over supervisors performing unit work to the unit employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole the unit employees, with interest, for any losses they suffered by reason of our failure and refusal to distribute the proceeds of the arbitration award that resulted from our grievance over the Employer's use of supervisors to perform unit work while the unit employees were on layoff status.

UNITED MINE WORKERS OF AMERICA,
DISTRICT 5, AND ITS LOCAL 1378,
AFL–CIO

Patricia J. Scott, Esq., for the General Counsel.
Kenneth Horcicak and *Jimmy Smith*, of Belle Vernon, Pennsylvania, for the Respondents.

DECISION

BERNARD RIES, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on October 22, 1993. The complaint alleges that the Respondent violated Section 8(b)(1)(A) of the Act since on or about November 20, 1992, by refusing to pay to Charging Party ''Selapack and other affected employee members backpay awarded to them by an arbitrator and instead insisted that the backpay award be retained in the treasury of Respondent Local Union 1378.'' The answer denies the material allegations of the complaint; the Respondent Unions, however, agree that they are labor organizations within the meaning of the Act and that there is a sufficient basis here for assertion of jurisdiction by the Board.

Briefs were received from the General Counsel and the Respondents on November 29, 1993. After due consideration of the briefs and the entire record, I make the following

I. FINDINGS OF FACT[1]

Respondent Local 1378, a subdivision of Respondent District 5 (the Respondent or the Union), has represented the employers of Tunnelton Mining Company (owned by Pennsylvania Mines Corporation)[2] for collective-bargaining purposes for an uncertain period of time. In June 1992,[3] the Company laid off approximately 140 employees pending the sale of its mine, leaving only 1 individual rank-and-filer still employed. During the layoff, the Company used supervisors to perform classified work such as mine inspection, electrical inspection, and mechanical. On July 7, the Union filed a grievance (naming ''E.T. Al on behalf of Local'' as the ''grievants'') asserting that supervisors had been performing classified work and asking for a make-whole remedy. The Company denied the grievance and, on September 9, the case went to arbitration.[4]

There is no need to analyze the extremely complex 13-page decision issued by the arbitrator on November 30. It is sufficient to say that he concluded that, in accordance with specific findings made in the arbitration award, the Employer should pay ''mine inspector, lampman, and mechanic for all hours they would have worked during period mine was idled.'' The arbitrator did not, however, specify the individuals who were entitled to backpay, that issue not having been litigated in the arbitration proceeding. Rather, ''[p]ursuant to a stipulation of the parties,'' he retained jurisdiction over ''the calculation of backpay and identification of the proper individuals to receive pay'' if either party so requested in writing within 60 days.

In early December, District 5 Executive Board Member Kenneth Horcicak wrote to a representative of Pennsylvania Mines Corporation, recapitulating their conversation of the preceding day regarding the number of hours to be compensated pursuant to the arbitration award. In closing, Horcicak stated:

> Finally, the Arbitrator has at this point left the issue of pay in our hands. As you know the grievances were filed et al and signed by Local Union No. 1378 president. I believe that the proper party to the award is therefore Local Union No. 1378. Precedent in Arbitra-

[1] Certain errors in the transcript have been noted and corrected.

[2] The caption was amended in accordance with the unopposed motion of the General Counsel filed subsequent to the hearing.

[3] All dates hereafter refer to 1992.

[4] Also, on August 28, at the instigation of the Respondent, laid-off employee Elwood Selapack, the Charging Party here, signed an individual grievance written by the Respondent, evidently animated by some obscure motion of circumventing a claim of untimeliness as to the first grievance. Selapack's grievance stated that since June 26, management had not scheduled a ''union fireboss,'' contrary to the alleged principle that ''if a union man is underground working, a union fireboss will also [sic].'' A ''fireboss'' is also referred to as a ''mine examiner'' and an ''inspector.'' The mine committee asked that Selapack be made whole. Selapack's grievance was denied by the Company and was then set aside by the parties. District Representative Kenneth Horcicak testified that the Union's purpose was to perhaps use the Selapack grievance as a ''second bite at the apple'' in case it lost the arbitrated grievance.

> tion relative to this issue has already been established and a copy of one such case is enclosed for your review. If we can agree on the above instead of speculating as to who may have returned[,] it is probably in Pennsylvania Mines Corporation's and the Union's best interest. I say this because of Pennsylvania Mines Corporation's position through the recalls that if employees did not desire to return to work they were not denied panel because of the temporary nature, and if you will recall that indeed did happen. For us to speculate as [sic] this time on who may or may not have chosen to work is inappropriate.

The Company agreed and in December sent the Union a check for $6121.09, which was deposited in the Local's account, on the basis of advice given to the District by the International that such a disposition would be appropriate. A ''Settlement Statement'' entry made on Selapack's separate grievance on an undisclosed date reads, ''Settled as per P.M.C. & Tunnelton Mining Co. & the Union, remittance made to L.U. [Local Union] base [sic] on ET, AL grievance.''

At the hearing, when asked about the meaning of the mystifying final three sentences of his December letter quoted above, Horcicak offered an equally opaque (to this layman) explanation, involving agreements made by the Company and the Union during the mine closure, which concluded with Horcicak's opinion that ''it would have been impossible to say during that time period who would and who would not have accepted recall, because there was no obligation for them to do so.'' Horcicak also testified that in their discussions, the Respondent and the Company ''felt it was complete speculation to say who would or wouldn't have returned to work, and we subsequently decided that since the arbitrator left it to us whether to refer it back to him or not, okay, that wasn't an order to refer it back to him, and we did what was in the best interests of the local at that point in time.''

After Selapack heard from Local President Don Lorelli that the Local had received a check from the Company and had been told by the District to deposit it in the Local's general fund, he attended the Local's January 1933 monthly meeting. At that meeting, the disposition of the arbitration award was discussed, and Mine Committee Chairman Markovitch stated that ''it would be too difficult to figure out who would get the money.'' Selapack questioned this assertion, saying that allocation would be ''easy to do.'' At no point in the instant hearing, however, was Selapack asked to explain his conception of an ''easy'' appropriate and legitimate basis for distributing the award.

II. THE GOVERNING PRINCIPLES[5]

Section 8(b)(1)(A) now clearly incorporates the ''duty of fair representation'' owed by a union to the employees on whose behalf it speaks and acts. See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *Ford Motor Co. v. Huffmann*, 345 U.S. 330 (1953); *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963); *Vaca v. Sipes*, 386 U.S. 171, 177–178 (1967). In the leading case of *Vaca v. Sipes*, supra, the duty was not—as it could not be—given detailed expression. The Supreme Court, instead, painted with a broad brush (386 U.S. at 190, 191):

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. There has been considerable debate over the extent of this duty in the context of a union's enforcement of the grievance and arbitration procedures in a collective bargaining agreement. . . . [W]e accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion.

The type of unfair representational treatment may take many forms, ranging from a refusal to provide referral information to an employee, *Service Employees Local 9 (Blumenfeld Enterprises)*, 290 NLRB 1 (1988), to a failure or refusal to process a grievance. The reason for the union's default, too, may vary. Action taken or not taken because of a grievant's intraunion (or other) politics, personal hostility, or racial discrimination could violate the statute. But so could the same action or inaction if attended by no animating force, but merely in consequence of culpable disregard (''arbitrary,'' perhaps, or ''perfunctory,'' or ''grossly negligent''—the Board, it should be noted, holds that ''something more than mere negligence'' is required, *Rainey Security Agency*, 274 NLRB 269, 270 (1985)). When there is no showing of bad faith or reckless disregard, but, rather, the union makes a conscious decision which adversely affects some members of the unit, *Ford Motor Co. v. Huffman*, supra at 338, adjures us that the union must be accorded a ''wide range of reasonableness.''

Although the Supreme Court has seemed to shift emphasis over the years in reformulating the elusive standard for assessing the duty, see *Transit Union v. Lockridge*, 403 U.S. 274, 301 (1971) (must be ''substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives''), *Hines v. Anchor Motor Freight*, 424 U.S. 554, 571 (1976) (requires ''more than demonstrating mere errors in judgment''), the Court's most recent comprehensive pronouncement on the subject adopted an approach which confirms *Ford Motor Co. v. Huffman*, supra, and gives it an extremely broad reading. In *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991), the Court stated:

> We hold that the rule announced in *Vaca v. Sipes* — that a union breaches its duty of fair representation if its actions are either ''arbitrary, discriminatory, or in bad faith''—applies to all union activity, including contract negotiation. We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a ''wide range of reasonableness,'' *Ford Motor Co. v. Huffman* . . . as to be irrational.

Thus, in a situation—as here—in which a union's conduct is not shown to be ''discriminatory'' or in ''bad faith,'' the Respondent can be found to have failed to provide proper representation only if its behavior ''is so far outside 'a wide

[5] I draw heavily in this section from the cases usefully collected and analyzed in P. Hardin, *The Developing Labor Law*, Ch. 26, pp. 1442–1455 (3d ed. 1992), First Supplement pp. 288–289.

range of reasonableness' . . . as to be irrational.'' Applying *O'Neill*, supra, see *Ackley v. Teamsters Local 337*, 948 F.2d 267 (6th Cir. 1991); *Alier v. Tuscan Dairy Farms*, 979 F.2d 946 (2d Cir. 1992).

The complaint states that the gravamen of the allegation in this case is that Respondent violated the Act by having ''refused to pay to Selapack and other affected employee members backpay awarded to them by an arbitrator and instead insisted that the backpay award be retained in the treasury of Respondent Local Union 1378.'' At the hearing, counsel for the General Counsel offered a somewhat different formulation of the cause of action: ''[W]hether the Union's failure to resubmit the case to an arbitrator for an identification of who that person is, or persons are [who are entitled to backpay] is a violation of the National Labor Relations Act''; ''The theory of the General Counsel is that the arbitrator specifically retained jurisdiction, that the Union could have invoked, should have invoked, and was legally obligated to invoke, because of the very purpose Mr. Horcicak says that he cannot specifically identify an appropriate classified mine examiner, mechanic, or lampman to distribute the award to.''

As earlier shown, the arbitrator did not mandate that the issue of allocation be decided by him, although he agreed to accede to the stipulation of the parties that either could, within 60 days of the award, ask him to render such a decision. I am unable to conclude, furthermore, that, had the Respondent made such a request, there is any evidence at all that the arbitrator could have done much better than arrive at some purely discretionary standard for distributing the $6000. For example, Selapack conceded that there were three ''classified'' mine examiners when the mine closed, and also there were ''ones ahead of me in seniority'' who were ''qualified to do mine examining.'' He also ''suppose[d]'' that certain other mines, which employed mine examiners and (I think) mechanics, had ''panel rights into Tunnelton,'' which, as I understand the record, would have given other laid-off employees of the Company some rights to be considered for recall. Horcicak seemed credible in testifying that division of the award would have been completely ''speculative'' because the Company and the Local ''had agreed to waive some contractual obligations or mandatory obligations of employees.'' Selapack, the only other witness, offered no explanation of why he thought it would be ''easy'' to distribute the money in some logical way.[6]

Although the General Counsel seems to be arguing that the failure to exercise the option of returning to the arbitrator for a compliance decision was a per se violation of the Act, I find nothing ''irrational'' about the Respondent's failure to do so. The record appears to support the Respondent's contention that the arbitrator would have been forced to make subjective judgments, applying whatever standards he might personally have evolved. In addition, I am uncertain about the manner in which a supplementary proceeding would have been conducted. The Respondent states that it could perceive no objective theory for awarding the funds, and therefore would presumably have made no presentation to the arbitrator. I assume, furthermore, that the Company (which had sold the mine) very likely had no interest in how the money was divided. This would have left the arbitrator in the unusual position of searching out whatever evidence might be relevant, in the hope of unearthing some useful standard, instead of occupying the normal role of having advocates present evidence to him. Such an unstructured proceeding would certainly have taken a substantial bite out of the $6000 award in order to pay for the arbitrator's additional fee.

The principal argument advanced on brief by the General Counsel is based on a line of cases in which the Board has held that once a union undertakes to present a grievance to an arbitral forum, it is obliged to act as the employee's ''advocate,'' and present the grievance in the light most favorable to the grievant. See *Teamsters Local 705 (Associated Transport)*, 209 NLRB 292 (1974), petition for review denied 532 F.2d 1169 (7th Cir. 1976); *Hotel & Restaurant Employees Local 64 (HLJ Management Group)*, 278 NLRB 773 fn. 3 (1986). These cases do not seem to be apposite here. Unlike *Associated Transport*, supra, where the union stated before the grievance committee that the grievance was unmeritorious, the Respondent here vigorously pursued and won its grievance on behalf of unnamed employees. It seems obvious that only after reflecting on the disposition of the award did the Union conclude that no sensible formula for disbursing the proceeds could be concocted. While that may have been shortsighted on the part of the Respondent, it scarcely makes the decision to turn the funds over to the Union treasury ''irrational.''[7]

The General Counsel goes on to argue:

> Thus, it is respectfully submitted that the standard of care required of the Respondent Unions in this case, where they accepted and processed a grievance on behalf of the Union's members and where they ''settled'' the ''Selapack grievance'' upon the results of the arbitration, is greater than the standard of care applied in the prearbitral stages of the grievance procedure. Spe-

[6] I further note that the issue might have been complicated still more by the fact, conceded by Selapack at the hearing, that the contract did not allow retention of classification in a layoff situation. While Selapack also referred to hearing of an agreement between one of the companies involved and the Union that all the laid-off employees would go back to work ''under our classification,'' that would not necessarily apply to the interim situation which the arbitration addressed.

[7] Although there is no indication that the Board has abandoned the *Associated Transport* doctrine, it seems somewhat uncomfortable with the principle; see *HLJ Management Group*, supra at fn. 3, and *Service Employees Local 579 (Convacare of Decatur)*, 229 NLRB 692 fn. 2 (1977), where the Board stated that the duty to, act as an ''advocate'' in an arbitral setting does not obtain in prearbitral grievance meetings.

It is not easy to understand the difference between the two situations. The Court of Appeals for the Seventh Circuit, in enforcing *Associated Transport*, supra, relied on ''venerable tort law that purporting to take action where duty is nonexistent creates in itself certain duties.'' But that rule is founded in the possibility that voluntary intervention may have the effect of discouraging other volunteers and assistance, thus imposing a responsibility on the first intervenor. Restatement, Second, Torts § 323 Comment: c. pp. 137–138. In the case of an arbitral procedure in which the union exclusively controls the reference of grievances to arbitration, however, the union's decision to arbitrate cannot have the effect of seducing the grievant to refuse or abandon other sources of assistance, because there are no other sources. Hence, there does not appear to be any reason for imposing a higher standard on the union once the grievance has been referred to arbitration than at earlier stages of the process.

> cifically, insofar as the arbitrator issued an award of backpay to be paid to certain classified employees and the Respondent Unions received the moneys awarded pursuant to such an award, the standard of care which should be applied is the standard of care expected of a trustee of funds.

The preceding analysis presents two difficulties. One is factual: the Respondent did not ''accept'' the grievance which was processed; the grievance was, rather, initiated by the Respondent. The second is more substantive.

Echoing earlier cases, the *O'Neill*, supra, Court stated that, indeed, ''[t]he duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries.'' It went on to describe this duty as the obligation to represent employees ''adequately as well as honestly and in good faith.'' But the standard of representing ''adequately'' must be viewed in the light of the ''irrationality'' criterion also laid down in *O'Neill*. And even assuming that the Respondent Unions should be considered ''fiduciaries'' with respect to the $6000 award, can it be said that any trust relationship was violated in view of the facts that (1) the arbitrator did not require, but offered only a voluntary opportunity (pursuant to a stipulation of the parties) to return to him for a supplemental decision; (2) the Respondent clearly acted in good faith, and with no demonstrable negligence, in concluding that there was no reasonable basis for dividing the funds among the unit employees; and (3) the only positive evidence of record bolsters the Respondent's conclusion that, in order to award the money to individuals, the arbitrator would have had to invent his own standard (which might lead to more intra-union disruption than the resolution chosen by the Union).

The foregoing analysis leads me to conclude that Respondent's decision not to seek a supplemental order from the arbitrator was within the ''wide range of reasonableness'' afforded by, *Huffman*, supra, and was plainly not ''irrational,'' *O'Neill*, supra. I therefore recommend that the complaint be dismissed.[8]

CONCLUSIONS OF LAW

1. The Respondents, United Mine Workers of America, District 5, and its Local 1378, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

2. It is appropriate for the Board to assert jurisdiction over the issues raised in this proceeding.

3. The Respondents did not violate the Act as alleged in the complaint.

ORDER

[Recommended Order for dismissal omitted from publication.]

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[8] I note that counsel for the General Counsel argues that retention of the $6000 ''would presumably benefit the whole of the local membership but not necessarily the whole of the unit.'' The key words here are ''not necessarily''; counsel may be correct, but there is no evidence either way.

I also should acknowledge the General Counsel's contention that since the arbitration award only intended to benefit certain classifications, the deposit of the funds in the Local's treasury is inconsistent with that intent. This seems quite likely (although not impossible—the Local conceivably could apply the money so as to only improve the lot of the named classifications). Nonetheless, since the record indicates that it was not unreasonable for Respondent to determine that there was no objective basis for concluding which of the employees in each classification would have received the assignments, the Respondent's decision to bring an end to the matter was not unwarranted.